

A FOIA Guide

Introduction

The House Committee on Government Operations once published a *Citizens Guide on Using the Freedom of Information Act* which opened with a quote from an 1822 letter from James Madison to W.T. Barry. It is an appropriate way to introduce this updated version of that guide.

“A popular government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

In a landmark case brought by a CBS news correspondent in connection with the FBI’s ABSCAM investigation the Supreme Court declared that the Freedom of Information Act was designed to create a broad right of access to “official information.” In it Justice William O. Douglas quoted historian, Henry Steele Commager:

“The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.”

The Freedom of Information Act generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.

Enacted in 1966, the FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives. It revised the public disclosure section of the Administrative Procedures Act, which generally had been recognized as falling far short of its disclosure goals and had come to be looked upon as more a withholding statute than a disclosure statute.

The original FOIA contained weaknesses which detracted from its ideal operation. In response, the courts fashioned certain procedural devices, such as the requirement of a “Vaughn Index” -- a detailed index of withheld documents and the justification for their exemption. (The Vaughn Index contains a description of the contents of each document, a description of the type of information withheld, the exemption claimed as the basis for withholding the information, and the reason the omitted information is subject to the exemption.) It also established in *Vaughn v. Rosen*, the requirement that agencies release

segregable nonexempt portions of a partially exempt record, first established in *EPA v. Mink*.

In an effort to further extend the FOIA's disclosure requirements, and as a reaction to "Watergate era" abuses, the FOIA was substantially amended in 1974. Those amendments narrowed the overall scope of the Act's law enforcement and national security exemptions and broadened many of its procedural provisions, such as those relating to fees, time limits, segregability, and in-camera inspection by the courts.

In 1976, Congress again limited what could be withheld as exempt from disclosure under the FOIA, this time by narrowing its incorporation of the disclosure prohibitions of other statutes.

In 1981, after several years of administrative experience with the FOIA, as amended, congressional hearings demonstrated that the Act was in need of both substantive and procedural reform. Consequently, new FOIA amendments were advanced through the legislative process with the aim of strengthening the Act's nondisclosure provisions and improving many of its procedural provisions.

Those FOIA reform efforts continued through 1986 and, in a relatively sudden development near the end of that year, Congress passed major FOIA reform legislation as part of the Anti-Drug Abuse Act of 1986. This legislation provided broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and it also created a new fee and fee waiver structure. Fees must now be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Decisions about granting fee waivers are separate from and different than decisions about the amount of fees that can be charged to a requester.

The FOIA specifies only two requirements for access requests: that they "reasonably describe" the records sought and that they be made in accordance with agencies published procedural regulations. The legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient "if it enables a professional agency employee familiar with the subject area to locate the record with a reasonable amount of effort." It has been observed that "the rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters to conduct fishing expeditions through agency files." However, an agency "must be careful not to read a request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."

The fact that a FOIA request is very broad or "burdensome" in its magnitude does not in and of itself, entitle an agency to deny that request on the ground that it does not "reasonably describe" the records sought. The key factor is the ability of an agency's staff to reasonably ascertain and locate exactly which records are being requested. The

courts have held only that agencies are not required to conduct wide-ranging “unreasonably burdensome” searches for records.

The adequacy of an agency’s search under the FOIA is determined by a test of “reasonableness,” which may vary from case to case. As a general rule, an agency must undertake a search that is “reasonably calculated” to locate the requested records and, if challenged in court, must be able to show “what records were searched, by whom, and through what process.”

It has also been held by the courts that agencies do not have to organize or reorganize file systems in order to respond to particular FOIA requests, to write new computer programs to search for “electronic” data not already compiled for agency purposes, or to aggregate computerized data files so as to effectively create new, releasable records. More than one court has ruled, though, that agencies may be required to perform relatively simple computer searches to locate requested records or demonstrate why such searches are unreasonable in a given case.

It was also true that the agency, not the requester, could choose the format of disclosure, when the agency chooses reasonably under the circumstances presented -- but agencies should exercise administrative discretion in honoring requester choices and in complying with FOIA requests without “unnecessary bureaucratic hurdles.” While it was well-established “that computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are records for the purposes of the FOIA,” it also had been held that the FOIA “in no way contemplates that agencies, in providing information to the public, should invest in the most sophisticated and expensive form of technology.” Yet agencies were encouraged to use advanced technology to satisfy existing or potential FOIA demands most efficiently--including through “affirmative” electronic disclosures.

Nonetheless, it was these electronic-type searches which have become the object of the package of “Clinton amendments” signed in October, 1996.

The Amendments

The amendments approved by the President are called the “*Electronic Freedom of Information Act*.” The measure covers electronic reading rooms, electronic records, and new requirements for time limits and backlogs.

This new law directly addresses electronic records for the first time ever.

It requires that FOIA requests likely to be subject of future requests be made available electronically in the agencies reading room. It also requires that newly created reading room records be available by electronic means after November 1, 1996 in the form of on-line access using web sites. By mid-1997 both conventional and electronic reading rooms will be necessary to meet statutory obligations. Finally, an agency must begin providing records in any format requested -- if it is maintained and reproducible in that

format. This provision encourages electronic database searches and new efforts to comply with particular FOIA requests.

Until the new law, reformulation of overly broad document requests were recommended and frequently used, but were not included in the statute. Additionally, government agencies were not obligated to organize records electronically on grounds the cost would be enormous. Now existing computer systems will be used, where appropriate, to index and make available documents for which there are repeated requests. That opens the door to more extensive electronic record keeping and electronic searches in the future.

Under FOIA failure to turn up documents in an electronic search does not demonstrate a search to be inadequate. DOE generally considered a search of stored boxes to be overly burdensome, but relented when transfer sheets listing documents were available.

The burden of demonstrating a search to be reasonable rests with the agency and remains until the documents are found, as demonstrated by appropriate affidavits setting out the search procedure. The requester may contradict the procedure or give evidence of bad faith on the part of the agency. The courts have held that an agency is obligated to either search for and disclose sought after, but undisclosed records and disclose them if they are unexempt or treat them in a Vaughn Index if they are exempt.

Finally, another key case held that an agency must make disclosable records available itself, and may not avoid that duty by pointing to another public source.

Electronic Reading Rooms

Agencies are required to make three categories of records routinely available for public inspection and copying. They include final opinions rendered in the adjudication of administrative cases, specific agency policy statements, and administrative staff manuals that affect the public. The new amendments both add to those categories of reading room records and establish a requirement for electronic availability of reading room records, most efficiently through on-line access, in what can be regarded as “electronic reading rooms.”

- (1) - The amendments create a new category of records to receive reading room treatment -- consisting of any records processed and disclosed in response to a FOIA request that “the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”

Under this provision, when records are disclosed in response to a FOIA request, an agency will be required to determine if they have already become the subject of subsequent FOIA requests or, in the agency’s best judgment based upon the nature of the records and the types of requests regularly received, are likely to be subject of multiple requests in the future. Those records in this FOIA-processed form will become “reading

room” records to be made automatically available to potential FOIA requesters.

- (2) - The amendments will require agency’s to use electronic information technology to enhance the availability of their reading room records. They specify that for any newly created reading room records (i.e., “records created on or after November 1, 1996), an agency must make them available to the public by “electronic means.”

They embody a strong statutory preference that this electronic availability be provided by agency’s in the form of on-line access, which can be most efficient for both agency’s and the public alike, and they allow for it to be provided until November 1, 1997. To meet this new requirement agency’s must have Internet or Web sites prepared to serve this “electronic reading room” function by that date. This means that as of mid-1997, agency’s will begin to maintain both conventional reading rooms and “electronic reading rooms” in order to meet their FOIA subsection (a)(2) responsibilities.

As of March 31, 1997 the basic effective date of the amendments, they must begin to place in their reading rooms copies of any FOIA-processed records determined to fall within the new fourth subsection (a)(2) category.

Additionally, they must identify any of their reading room records that were created on or after the November 1, 1996 cutoff date and then make those records available (no latter than November 1, 1997 electronic access deadline) through their electronic sites. Virtually everything that an agency places in its reading room, in time, will be newly created and therefore will be required to be made available electronically also. In the case of FOIA processed records, on the other hand, a very large proportion of those records will have been created prior to the 1996 cut-off date, at least as of the outset of the new law’s implementation, and therefore will not be subject to the electronic availability requirement. Agencies are required to maintain an index of FOIA-processed records on-line by December 31, 1999.

Electronic Records

Several amendments pertain to processing FOIA requests for records in electronic form. A record includes those in any format including electronic. It confirms the existing practice of treating electronic information as subject to FOIA.

Second, it requires an agency to provide the record in any format requested -- if it is reproducible in that format and to maintain records in such formats. They require accommodation of a requesters choice of format and that reasonable efforts be made to disclose a record in a different form when that is requested and the record is "readily reproducible" in that new form or format. The requester, not the agency, ordinarily will be entitled to choose the form of disclosure when multiple forms of the record already exist. Any record requested in a new form should be considered on a case-by-case basis on the basis of being "readily reproducible" with "reasonable effort."

This provision encourages electronic database searches and new efforts to comply with electronic search requirements of particular FOIA requests. When new programming and new database efforts are required, it requires an agency to determine whether such efforts are reasonable. It isn't required where it would significantly interface with computer system operations.

Time Limits and Backlogs

After a year, several different amendments pertaining to the timing of responses to FOIA requests take effect.

First, response time (effective October 1, 1997) is increased from ten to twenty days.

Second, for agencies finding it difficult to meet time limits "multitrack processing of requests has been added. Each track, however, must handle requests on a first-in, first-out basis.

Third, an agency may take additional time based on "unusual circumstances" -- such as volume of records sought. The old act allowed only a ten-day extension. In October, under "unusual circumstances," an agency may indicate additional time is required and offer a requester the opportunity to "limit the scope" of the request and/or arrange "an alternative time-frame for processing." This provides an opportunity to time a response by mutual agreement, rather than imposing fixed time limits.

Fourth, are amendments which limit conditions under which the "exceptional circumstances" provisions may be applied to agency backlogs. It also may be applied where a requester prefers to modify, or arrange an alternative time frame for processing. Two separate amendments specify consideration in deciding whether exceptional circumstances exist.

A fifth time-limit-related amendment addresses expedited processing. Promulgation of regulations for considering such requests is required under conditions of "compelling need." They include threat to life or safety, or of persons engaged in disseminating information of public urgency involving actual or alleged government activity. Within ten days the agency must decide whether to grant expedited processing and notify the requester of its decision.

Limiting the Scope

In the event a request is overly broad or otherwise ill-defined, the Authorizing Official may call the requester to determine whether the request may be more narrowly drawn in the interest of making the BPA/FOIA effort more responsive, efficient, and timely. Such reformulation was encouraged by the original Act in 1974 and was expanded upon by the Clinton amendments.

The Energy Department's Office of Hearings and Appeals issued a determination on April 17, 1987 in an appeal by Warren Froelich, a journalist with the Hartford Courant. Froelich had sought information on the General Electric Company's Knolls Atomic Power Laboratory in Windsor, Connecticut. DOE found the request unduly broad. Its Authorizing Official determined the request did not meet the FOIA requirements and could not be processed. Froelich appealed, concluding that DOE should have contacted him in an effort to refine and clarify his request for records. In addition, Froelich argued that the DOE official failed to set forth an adequate justification for withholding the requested material on grounds it contained classified information.

OHA agreed that the FOIA request did not meet the requirements of 4(b) and (c)(1) -- that records be reasonably described. But, it did note that in such a case "the requester must be extended an opportunity to confer with appropriate DOE personnel in order to refine or clarify his request. "This type of communication between requesters and the agency is encouraged. It assists the agency in fulfilling the intent of the FOIA to make agency records accessible to the public, and increases administrative efficiency in handling the requests." OHA allowed Froelich to contact the official to assist him in formulating a new FOIA request.

Electronic Recordkeeping Not Necessary

Until the President signed the new electronic FOIA amendments the federal government recognized no obligation to either organize its records so they could be reached electronically or that failure to do so constituted an evasion. In fact the Energy Department's Office of Hearings and Appeals issued a determination noting that Robert L. Jackman's 22 page request neither reasonably described the records sought nor responded to an invitation to restate or reduce the request to manageable proportions. DOE found the request for electric powerline information too vague to determine what records were being sought.

In the 1990 case OHA said a request is not overly broad merely because it seeks a large amount of material or would require the agency to expend a substantial effort in order to respond. The focus was on whether, given the manner in which the agency's records are organized, a search can be conducted in an efficient and organized manner.

"There is no merit," declared OHA, "to Jackman's contention that the government agency's are obligated to organize their records so they can be searched electronically

and that failure to so organize records evades the FOIA.” The FOIA does not require agency’s to go to extraordinary lengths in order to respond to requests. In *Scientology v. FBI* the courts found that agency’s are not required to reorganize their recordkeeping procedures simply to enhance their ability to respond to a FOIA request.

“If the agency were to computerize searches for records, it would require virtually every document that might conceivably be requested pursuant to the FOIA to be indexed and entered into a computer database,” the court suggested. “The cost of such a project,” added the determination, “would be enormous.” Thus, until passage of the new law agency’s were required to use existing computer systems to identify responsive documents, and might voluntarily place in a computerized index documents pertaining to subjects for which there are repeated requests.” However, agency’s were not required either “to organize their records or to create computer systems solely to facilitate responding to FOIA requests.”

Perfection No Prerequisite

But, the FOIA did encompass some prior electronic recordkeeping and in one case concluded that failure to uncover all requested documents does not prove the search was inadequate.

In a 1992 case Daniel Grossman submitted a FOIA request for documents concerning emissions of Iodine-131 from the Hanford site in the 1940’s and 1950’s to the Richland Operations Office. It involved five separate requests. Three went to Department of Energy field offices and two went to DOE headquarters in Washington, D.C., but were subsequently sent to ROO. Some documents were released. Others weren’t provided for these reasons: (1) couldn’t locate, (2) overly burdensome, (3) not reasonably described, (4) documents destroyed, (5) already publicly available, and (6) classified documents.

Grossman appealed the Richland Operations Office determination and disputed each contention as “arbitrary and capricious” in violation of FOIA. The Authorizing Official had reported the documents were either in the possession of Westinghouse Hanford (WHC) or Pacific Northwest Laboratories (PNL), general contractors of the Hanford project in prior years.

WHC’s Management Information System (MIS) can perform electronic searches for specific documents by document number, title, or date. PNL maintains a card catalogue by which it can locate documents by document number, title, or author. When Grossman requested specific documents a search was performed, though in some cases none were found.

OHA noted it had previously found that where documents are regularly logged into a computerized tracking system, a search utilizing such a system is adequate under the requirements of FOIA.

In the present case, where a search was made utilizing the document retrieval systems of both WHC and DNL, DOE found “the field office followed procedures which were reasonably calculated to uncover the material sought by Grossman,” OHA said. “The fact that these searches did not uncover some requested documents does not indicate that the searches were inadequate.”

An Overly Burdensome Search

WHC and PNL data retrieval systems did not identify specific documents. However, in several instances the field offices were able to determine that responsive documents may be located within a group of boxed documents. Grossman had requested information on a 1947 meeting of a Safety and Health Advisory Board meeting. DOE/Hanford found 25 boxes of documents that might be related. “The FOIA,” however, “does not require research nor searches that are overly burdensome.” The OHA had no further response.

They subsequently learned of transfer sheets for the boxes in question which list the documents contained in each box. As a less burdensome alternative to a document-by-document search through 25 boxes, they instructed the Richland Operations Office to provide Grossman with copies of the transfer sheets so he might identify specific documents of interest to him.

OHA directed the Authorizing Official to aid Grossman in narrowing his request to exclude documents in which he had no interest -- hopefully expediting the process of providing him with responsive documents. The Clinton amendments give that authority new prominence.

Document Imaging

Federal agencies are increasingly looking to the use of document imaging and the potential of automated FOIA processing as a means of enhancing the efficiency and cost-effectiveness of their operations. Rapid advances in document-imaging technology in recent years have provided strong impetus to such efforts at several agencies including the Federal Bureau of Investigation, the Central Intelligence Agency, and the Department of Energy.

Document-imaging technology converts the information contained in paper records into an electronic form. Once in that form, the information can either be stored as images or converted into text that can be searched and modified electronically at a computer terminal.

The first step in the imaging process is to convert printed material into digital form by using a document scanner. This document “capture” is generally the most expensive part of the process, but the costs have decreased with advances in imaging technology. The scanned images are then stored on magnetic media or optical disks as part of an imaging system.

The stored documents must be indexed for purposes of retrieval. Users of the system can search the documents' indexed elements or fields by entering key words or phrases and then the system's search and retrieval software responds with a list of documents that contain the element sought. Portions of documents can be focused on individually in this way.

As a general rule, electronic documents take much less time to find, handle, refile, and route. They also can potentially be "processed" for FOIA disclosure in an automated fashion, rather than by hand. That is what led large-volume FOIA operations, such as those cited earlier, to begin exploring the use of this technology for FOIA purposes.

The FBI's program for automated FOIA processing is being developed to include electronic tracking of requests and records as well. "By 1999, we will have an electronic imaging system installed at FBI Headquarters and at all field offices for the tracking and processing of information requested under the FOIA and Privacy Act," predicted the agency's Project Manager. "Using electronic imaging management, we can develop methodology for tracking and processing paper documents in an automated way from the time a document is received...to its final disposition." Quick, clean document redaction processing was developed by the FBI several years ago.

The Central Intelligence Agency has developed an electronic imaging system known as MORI, an acronym for "Management of Officially Released Information." At the present time, 25 FOIA analysts at CIA Headquarters are making use of the system on a regular basis. Soon, 50 analysts and supervisors and another 50 at four CIA directorates will have access to the system.

The Department of Energy system began operating in 1996 and all FOIA requests were filed electronically. That means that for all requests last year, DOE can pull up the request, and have access to all the documents relevant to that request including the documents released, worksheets, correspondence, and tracking information. Additionally, all records in Energy's public reading room are being electronically scanned into its system. "A requester can just walk into the reading room, ask for a document, and we can pull it off the screen."

So far the imaging technology has been used for one major project at Energy. More than 20,000 pages of records on the subject of human radiation experimentation have been scanned into the system.

It is the FBI system that is the groundbreaking federal application for imaging technology, however. In 1993, when the Justice Department representatives of Vice President Al Gore's National Performance Review team were looking for possible projects to sponsor, that would use technology to make the federal government more efficient and customer friendly, this FBI automation project was identified as an excellent one for increased funding and development.

This led to the creation in 1994 of a National Performance Review “FOIA Lab,” a prototype electronic document imaging system within the FBI’s Information Resources Division. Document processors can access or download electronic documents for processing. Instead of “browning out” information with a marking pen or using some other manual redaction tool, they can delete words electronically -- but in a way in which FOIA requesters can still see where redactions are made.

Processing A FOIA Request

Receipt of a proper FOIA request requires notification that the request has been sent on for action. It also should include acknowledgment that responsive documents are enclosed, documents are already accessible in the public domain, or that no documents have been found. It could also be that a letter fails to meet FOIA criteria. Reasons include failure to include a statement of willingness to pay; failure to substantiate a requested fee waiver; a request that is too broad; or the requester asks questions rather than asks for documents.

A proper FOIA request needs only three components --(1) that it is made pursuant to FOIA, (2) reasonably describe the record sought, and (3) express a willingness to pay processing charges.

Once a request is deemed received, it is the policy of BPA to provide the requested documents within ten working days from the time the FOIA Officer receives the request. However, when it is not possible to provide the requester with the records within the new twenty-day time period, the agency by mutual agreement and under unusual circumstances may “limit the scope” of a request or arrange an alternative time-frame. Some agency’s have backlogs of from one to two years and other amendments apply to them. BPA does not have such backlogs, however.

BPA’s standard acknowledgment letter is the responsibility of the FOIA Officer and states that the request has been received and forwarded to the Authorizing Official. It further states the date of the requester’s letter and the date it was received. It also identifies the receiving FOIA office and the office assigned to respond. It includes the name, number and address of the Authorizing Official. Requests receive expedited treatment under the “compelling need” amendment outlined earlier.

When retrieved records are determined to fully satisfy a FOIA request, the response letter should indicate the office processing the request, the individual who has determined that records are fully responsive, and an office contact name and telephone number. This letter should also indicate that this is the office’s final response to the request.

Denial letters should inform the requester of the reasons for the denial in explicit detail, including the name and title of each denying official, the requester’s right to appeal and the address to file an appeal. (If you have any questions call Carol L. Jacobson in the General Counsel’s Office at x4201).

The following are types of requests that fail to meet FOIA criteria.

The FOIA applies only to government records. When a request is for information rather than records, that request does not meet the criteria of a FOIA request.

A request must reasonably describe the records sought. A request is reasonably described if a professional employee, who is familiar with the subject area of the request, can ascertain what records are being sought and locate these responsive records with a reasonable amount of effort. Thus, a request that is broad, and sweeping or which lacks specificity would not meet the criteria of a FOIA request.

In addition to reasonably describing the requested documents, a request must conform with DOE's procedural rules. DOE Regulations 10 C.F.R. 1004.4(c)(1), requires that BPA be able to identify and locate requested records by a process that is not unreasonably burdensome or disruptive of BPA operations. Therefore, the BPA is not required to conduct wide-ranging and unreasonably burdensome searches for records.

One common failure is when the requester does not state a willingness to pay for processing fees including duplication, search, and if the request is made for commercial interests, review costs. A requester must state a willingness to pay for costs resulting from the processing of the request, even when such processing does not result in any responsive documents. Note, however, that the FOIA mandates that no agency shall charge a requester for the processing of fees where the charges assessed would be less than the cost of processing such charges. Currently, BPA has set this amount, which is referred to as an "allowance," at \$15.00.

A FOIA request may not be deemed received until the requester agrees to pay for fees incurred subject to the category of requester in which the person is placed, in accordance with 10 C.F.R. 1004.9, (10 C.F.R. 1004.4(e)), or until a requester qualifies for a waiver or reduction of fees has been made.

Proving Reasonableness

Miller v. State Department gave convincing evidence that the search was reasonable and the burden shifted to the requester to rebut that evidence by showing that it was not in fact in good faith. Further the judge concluded it is not necessary to create a document that does not exist in order to satisfy a FOIA request. James Miller, an amateur historian, in July, 1981 asked for documents relating to an attack on the U.S.S. Liberty 14 year earlier and any evidence the *attack* wasn't deliberate. In order to discharge its FOIA obligations the agency "must prove that each document that falls within the class requested either has been produced, is identifiable, or is wholly exempt from the Act's inspection requirements.

"An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and

submitted in good faith.” Congress intended giving them substantial weight in national security cases. “These affidavits are equally trustworthy when they aver that identified documents are exempt.”

Despite this weight to be accorded to agency affidavits, the burden remains on the government to demonstrate that it has thoroughly searched for the requested documents where they might reasonably be found. If the agency has not made this showing, then the requester can avert summary judgment merely by demonstrating some reason to think that the document would have turned up if the agency had looked for it, by showing the document originated with the agency or that the agency is set up to retrieve just that kind of document.

But, once the agency has shown by convincing evidence that its search was reasonable, that it was especially geared to recover the requested documents, then the burden is on the requester to rebut that evidence by a showing that the search was not in fact in good faith.

Summary judgment would be improper if the adequacy of the agency’s search were materially disputed on the record, for such a dispute would indicate that material facts were still in doubt.

The affidavits by responsible officers set out in detail the search procedure used in responding to the report. In order to retrieve documents on the U.S.S. Liberty incident, State Department personnel searched manually through the subject matter files which were most likely to contain such material. Two such files were screened for 1967 to 1973. Some 619 documents were retrieved. Each document was reviewed for exemption. The appellant must raise a factual issue in regard to the reasonableness of the search. This can be done either by contradicting the defendants account of the search procedure or by raising evidence of the defendants bad faith.

In *Miller*, Miller sought to do this by (1) evidence of existing, but unreleased and unaccounted for documents; (2) evidence that the Department released a number of documents long after it had averred by affidavit that all responsive documents had been released, and (3) evidence of the Department’s delay in responding to his request.

Miller argued that he had identified documents not sent to him indicating an inadequate search on the part of State. He attacked the competency of the search method because it did not uncover known and identified documents. The appeals court held that the standard of reasonableness does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. On more than one occasion the agency either suggested or openly invited that all relevant documents had been released only to disgorge, upon further prodding additional documents. “Such discovery is not conclusive of bad faith,” the court declared. “It may be indicative of administrative inefficiency, or it may, as in this case, indicate reluctant diligence by the agency under the goad of persistent litigation by a determined plaintiff.”

The court did agree that the Departments' response left something to be desired. "The progress made in processing can at best be described as glacial, particularly before the lawsuit was filed." State had a backlog of about 3,000 FOIA requests.

Finally, the court held the search to be adequate. "Once the agency has demonstrated that it has made a reasonably thorough search in a place where the documents are likely to be found, and has accounted for the documents, and the requester has failed to show that such a search was not made, the federal courts have no further statutory duty to perform under the Act.

Clarity Triggers Search Obligation

The Freedom of Information Act search policy was laid out in detail in a 1990 case involving an historian and the State Department. A senior circuit judge held in *Truitt v. State Department* that the agency could not refuse to search a file likely to contain sought-after but undisclosed documents solely on a claim the request did not reasonably describe the records. The judge further held the department was obligated to conduct a reasonable search for removed items and to either disclose them if they were not exempt, or if deemed exempt, to treat them in its Vaughn Index.

Marc Truitt was probing Anglo-American policies and activities toward Albania during World War II and afterward. The State Department conducted a search which did not extend to the principal source of documents, "File 767." Truitt later found a large number of pertinent documents at the National Archives which had not been released to him and demanded access. That request was not honored by the Department which chose not only to shield items from disclosure, but by refusing to list them in its Vaughn Index, to insulate them from any contest over nondisclosure. "We perceive," the Appeals court declared, "no basis upon which the Department could vindicate that action even if it were true that Truitt's earlier calls for information were too vague to implicate File 767." A request which does not "reasonably describe" the documents sought does not trigger a search of agency records. "When," however, "an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth."

Disclose, Or Index

The courts have repeatedly made clear that Section 3 of the Administrative Procedures Act, the forerunner of the Freedom of Information Act, is not to be used to obstruct public access to agency records. Nonetheless, it continued occurring.

With exceptions inapposite here, Section 3 (a) 3 specifies that:

each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

The language “request for records which...reasonably describes such records” was inserted in 1974 in replacement of the words “request for identifiable records,” the terminology of Section 3 as originally enacted in 1967. Committee reports in both houses of Congress had declared that a “request for identifiable records” involved no more than a reasonable description enabling agency personnel to locate the records sought, and had warned that the 1967 statutory formulation was “not to be used as a method for withholding.”

The 1974 Senate Report also noted that “cases have continued to arise where courts have been called upon to chide the government for attempting to use the identification requirement as an excuse for withholding documents.” The Report cited three decisions in which the government had the temerity to argue that the request being reviewed was not for “identifiable records,” even though the (lower) court specifically had known all along precisely what records were being requested. “While the committee does not intend by this change to authorize broad categorical requests where it is impossible for the agency reasonably to determine what is sought...it nonetheless believes that the identification standard in the FOIA should not be used to obstruct public access to agency records.” The 1974 language substitution “makes explicit the liberal standard for identification that Congress intended and that the courts have adopted should this create no new problems of interpretation.”

The court did not doubt the State Department’s sincerity but said the fact of the matter was that the Department was mistaken, for there were responsive documents in File 767 and likely others equally responsive which then had been or later were taken out. In that situation “what is expected of a law abiding agency is that it admit and correct error when error is revealed.”

The court held the Department could not justify its inertia on Truitt’s request simply on the claim he had not manifested it earlier. “Rather, the Department came under a duty to conduct a reasonable search for the removed items, and to either disclose them to Truitt if they were non-exempt or if deemed exempt, to treat them in its Vaughn Index to afford the requester an opportunity to contest the exemption claim, and to provide a reviewing court with an informed basis upon which to rule.”

Release Disclosable Records

Tax Analyst v. Justice Department involved a publisher of a nonprofit tax magazine seeking weekly access to federal district court opinions and an injunction against continued withholding. The court held they were not improperly withheld, though acknowledging they had difficulty obtaining tax decisions from some ninety-odd, far-flung federal district courts from their clerks offices on any timely or regular basis.

The court concluded that “imposing an enormous and costly administrative burden” on the Justice Department to serve already publicly available material for a commercial publication is certainly not the commonly perceived purpose of the FOIA. “Access,”

they suggested, “could involve no more than a memorandum to tax attorney’s telling them to make an extra copy of district court decisions for routing to a central file to which plaintiffs would have access from an agency reading room. The yoke of the FOIA may be lighter than it would appear at first glance.” The court concluded that the statute does not confer judicial discretion to balance its dictates against the administrative burdens of disclosure. The court further held in *Sears v. Gottschalk* that burden and expense of disclosure does not justify withholding.

Congress eliminated agency discretion to withhold information on administrative burden grounds when it substituted FOIA for section three of the Administrative Procedures Act. Moreover, Congress explicitly dealt with the matter of administrative expense by proceeding for the payment of search and duplication costs for FOIA claimants.

In sum, the D.C. Appeals Court held that in response to a FOIA request, an agency must itself make disclosable agency records available to the public and may not on grounds of administrative convenience avoid this statutory duty by pointing to another public source for the information.

Unpublicized Time Limit Barred

A free-lance journalist, Fielding M. McGehee, III, brought action to compel the Central Intelligence Agency to respond to his request for records pertaining to “People’s Temple” in Guyana.

McGehee was a relative of three victims of the gruesome demise of the cult in Jonestown. In a case decided by the D.C. Circuit, the judge remanded for additional evidence concerning CIA use of a time-of-request cutoff date. Additional questions involved why the agency did not release any documents until almost two and a half years after the request and whether it acted reasonably in using early cutoff date in searching for the requested information. The court concluded that in failing to disclose the fact that it was even using such a cutoff date there was a suggestion that it might not have processed the request in good faith. The judge noted that the District Court had upheld as reasonable “a rule which had the effect of limiting the FOIA search to materials in the agency’s possession on the date when the appellant made his initial request.” This policy was given court approval even though the agency failed to disclose any documents until compelled to do so by court order years later. The Circuit said the ruling misinterpreted the law and then reversed the decision.

Nonetheless, no immediate effort was made to retrieve the documents. McGehee’s request was placed at the end of a “processing queue,” the CIA’s system for dealing with FOIA requests on a “first-in-first-out basis.” Between mid-January, 1979 and December, 1980, the agency did virtually nothing about the request. McGehee filed suit and the court, set a deadline for processing the request, release of non-exempt material, and submission of a Vaughn Index cataloging any withheld documents.

On May 5, the agency revealed it possessed 84 responsive documents. Twelve were released in full; 18 were released with substantial portions deleted; 26 were withheld; and 28 were forwarded to other agencies from which the CIA had originally obtained them. Of those, 27 originated with the State Department and one with the FBI.

When McGehee received the documents it became evident the agency had been using the original request as a cut-off date for its FOIA search. It also raised the possibility the agency limited its searches to files denominated “People’s Temple” and hadn’t sought information under closely related headings. McGehee charged the agency failed to discharge its statutory obligation when it retrieved and released only documents that originated with and were in the possession of the CIA during the first month following the events to which his request principally related. The court noted:

An agency is not “required to reorganize its files in response to a demand for information, but it does have a firm statutory duty to make *reasonable* efforts to satisfy it.”

The same standard applied to test thoroughness and comprehensiveness of agency search procedures is equally applicable to test the legality of an agency rule establishing a temporal limit to its search effort. In other words, a temporal limit on FOIA searches is only valid when the limitation is consistent with the agency’s duty to take reasonable steps to ferret out requested documents.

The Circuit followed by holding information bearing on a temporal limitation and the Acts intention toward documents not covered by an exemption are within the control of the agency. “The agency should bear the responsibility of convincing them that the truth of the fact that its less than comprehensive search is reasonable under the circumstances.”

The standard to be satisfied is as follows:

It is well settled in FOIA cases as in any others that “summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as matter of law.”

The district court was entitled to rely upon affidavits submitted by the agency, describing its search procedures and explaining why a more thorough investigation would have been unduly burdensome. But affidavits would suffice only if detailed, nonconclusory and not impugned by evidence in the record of bad faith on the part of the agency.

The CIA made the legal argument that a time-of request cut-off date is always reasonable. The Circuit held that the CIA arguments don’t survive scrutiny. It concluded that the CIA took two and a half years to respond to McGehee’s request. Yet, when it

finally released documents, the CIA chose to limit itself to records that originated with and were possessed by the agency during the first 35 days following the tragedy.

Finally, the court said “it would be extremely difficult for the CIA to convince us that it may ‘reasonably’ use any cutoff date without so informing the requester.” Such notification would involve an insignificant expenditure of time and effort on the part of the agency. And it would enable the requester to submit supplementary demands for information if he felt so inclined. The CIA’s *unpublicized* temporal limitation of its searches should be held invalid.

Fees

FOIA requesters may have to pay fees covering some or all of the costs of processing their requests. As amended in 1986, the law establishes three types of fees that may be charged and makes the process of determination more complicated. It also reduces or eliminates the cost for small non-commercial requests.

There are three principal charges. First, fees can be imposed to recover the cost of copying documents. Second, fees can be imposed to recover the costs of searching for documents. Third, fees can be charged to recover review costs. (Review is the process of examining documents to determine whether any portion is exempt from disclosure.)

Different fees apply to different requesters. There are three categories of FOIA requesters. The first includes representatives of the news media, and educational or noncommercial scientific institutions whose purpose is scholarly or scientific research. A requester in this category who is not seeking records for commercial use can only be billed for reasonable standard document duplication charges. A request for information from a representative of the news media is not considered to be for commercial use if the request is in support of a newsgathering or dissemination function.

Second, is a commercial use category. The third is for all other requesters.

- *News media, educational, and non-commercial scientific* -- Documents in this category are provided for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible, a requester must meet the criteria and the request must not be for commercial use. A request for records supporting the news dissemination function of the requester will not be considered to be for commercial use. To be eligible for inclusion as an education and non-commercial scientific institution, requesters must show the request being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific research (if it is from a non-commercial scientific institution).
- *Commercial use* -- Charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 pages of

reproduction of documents. Commercial use is not defined by law, but generally includes profit-making activities. The BPA will recover the cost of searching for and reviewing records even if there is ultimately not disclosure of records.

- *All Other* -- Those falling in none of the prior categories will be charged the full reasonable direct cost of searching and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. People seeking information for personal use, public interest groups, and non-profit organizations are examples of requesters who fall into the third group. Moreover, requests from individuals for records about themselves will continue to be processed under the fee provisions of the Privacy Act of 1974.

Summary

A valid FOIA request must include a statement of the requester's willingness to pay appropriate fees. That assurance may ask that a fee not exceed some specified amount, or request a waiver or reduction of fees. (1004.7(e))

In a case where the request is being granted by the agency, and fees are \$15 or less, or where fees are being waived, the records may be made available before all charges are made. (1004.7(a))

The bulk of the fee provisions, however, are contained in subsection 1004.9, and include fees for record searches, review for exemptions, duplication and other charges, restrictions on fees, and a provision for advance payment. Key provisions are as follows:

- Manual searches are done at salary rates (at basic pay plus 16 percent) of employees making the search. (1004.9(a)(1))
- Charges may also be made for a review to determine whether or not exemptions may be claimed. (1004.9(3))
- Duplication of paper involves a 5 cent per page charge and other services (such as express mail) at the discretion of the agency. (1004.9(5)(ii))
- When BPA determines fees will exceed \$25, the requester will be informed, unless willingness to pay a specified amount has already been agreed to. The request is deemed not to be received until agreement is reached for total anticipated fees. (1004.9(7))
- When a fee exceeds \$25 and the requester is notified, the agency offers the requester an opportunity to reformulate the request to reduce the cost. (1004.9(7))

- When payment exceeds \$250 assurance of full payment is required where the requester has a strong history of prompt payment, or advance payment in a case where the requester has no history of payment. (1004.9(8))

Fee Waivers and Denials

The 1986 FOIA amendments changed the law on fee waivers. The BPA will furnish documents without charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First, it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the BPA, the waiver or reduction of a FOIA fee will be granted.

Legislative History

Senator Patrick Leahy of Vermont argued during debate on the Freedom of Information Reform Act (which established the two-pronged test for fee waivers) that the statute was to be “liberally construed in favor of waivers for non-commercial requesters.”

Nonetheless, in *Larson v. CIA* the Court held that “a public interest isn’t sufficient if the requester fails to identify the newspaper company to which he intended to release the requested information, his purpose for seeking the material, or his professional or personal contacts with the paper.” Further, the Court decided an agency may infer a lack of substantial public interest “when a public interest is asserted, but not identified with reasonable specificity, and circumstances do not clarify the point of the request.”

Note that the minimum threshold requirement before being eligible to receive a waiver of fees is that the requested information must not be made primarily for commercial interest. The news media, despite the obvious commercial interest, is usually granted a fee waiver. That is because in balancing the public interest with the commercial interest the public interest takes precedence. Thus, when a commercial entity can demonstrate that the requested records will be disseminated to the public on a large enough scale, and that requested information would contribute significantly to the public understanding of the operations or activities of the government, a balancing test should be applied to judge the eligibility of a fee waiver.

An 800 subscriber newsletter should not be considered adequate dissemination for informing the general public. An article published in a magazine that has over 30,000 subscribers could meet the dissemination threshold. The information, however, would still need to contribute significantly to the public’s general understanding of the operations or activities of the government.

The New Amendments

When the Freedom of Information Act was amended in 1986 the Department of Justice, in its role as the lead federal agency in ensuring compliance with the FOIA, issued new guidelines which identified four criteria to be applied when considering fee waivers and reductions. That disclosure of the information is in the public interest because “it is likely to contribute significantly to public understanding of the operations or activities of the government may be determined by applying criteria which includes, but is not limited to, the following.

- (1) The subject of the request: whether the subject of the requested records concerns “the operations or activities of the government.”
- (2) The information value of the information to be disclosed: whether the disclosure is “likely to contribute” to an understanding of government operations or activities.
- (3) The contribution to an understanding by the general public of the subject likely to result from disclosure;
- (4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

If disclosure of the information “is not primarily in the commercial interest of the requester the Freedom of Information Act Officer must apply criteria including, but not limited to, the following.

- (1) The existence and magnitude of a commercial interest; Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
- (2) the primary interest in disclosure: Whether the magnitude of the identified commercial interest in disclosure, is “primarily in the interest of the requester.”

These criteria were applied in a western case filed two years later in 1989 and completed by the Department of Energy’s Office of Hearings and Appeals in April 1993.

In that case the Idaho Operations Office denied a request from David DeKok, an author writing about the Three Mile Island nuclear meltdown, which he had appealed to OHA. In its determination OHA used four of the factors saying: (A) “in the present context we would expect many of the documents responsive to the request to meet this criterion; (B) “Information does not contribute to public understanding where, for example, it is in the public domain or otherwise common knowledge among the general population; (C)

DeKok is (a) able to analyze and interpret information to be released, and (b) intends and is likely to disseminate information to the public; and (D) Idaho Operations Office must determine whether disclosure will likely enhance the level of public understanding of the operations and activities of the government. If it determines release would not significantly enhance public understanding, it must nevertheless identify the document and provide an explanation of its determination.

Additional Considerations

The 1986 amendments on fees and fee waivers have created some confusion. Determinations about fees are separate and distinct from determinations about fee waivers. For example, a requester who can demonstrate that he or she is a news reporter may only be charged duplication fees. But a requester found to be a reporter is not automatically entitled to a waiver of those fees. A reporter who seeks a waiver must demonstrate that the request also meets the standards for waivers.

Normally, only after a requester has been categorized to determine the applicable fees does the issue of a fee waiver arise. A requester who seeks a fee waiver should ask for a waiver in the original request letter. However, a request for a waiver can be made at a later time. The requester should describe how disclosure will contribute to public understanding of the operations or activities of the government.

Any requester may ask for a fee waiver. Some will find it easier to qualify than others. A news reporter who is only charged duplication costs may still ask that the charges be waived because of the public benefits that will result from disclosure. A representative of the news media, a scholar, or a public interest group is more likely to qualify for a waiver of fees. A commercial user may find it difficult to qualify.

The eligibility of other requesters will vary.

A Denial

A denial should (1) inform the requester that it is based on the conclusion that furnishing the requested material will primarily benefit the requester rather than the public at large, and (2) provide a brief explanation of why the requester does not qualify under the factors set forth.

In order to facilitate its analysis an agency may group similar documents together and make its fee waiver determinations on a category-by-category basis. An example should be given to illustrate the reasons for the determination made for the documents in each category. Care should be taken to ensure that any categorizations are reasonable, and that the analysis applied to each category is valid for each document in that category.

The agency must explain which factors disqualify individual documents from eligibility and provide an explanation of its rationale. It must permit the requester to decide whether the fee waiver has been properly applied and to formulate a meaningful appeal.

The Nine Exemptions

The nine exemptions from the mandatory disclosure requirement of the FOIA are both narrowly drafted and narrowly construed “in order to counterbalance the self-protective instincts of the bureaucracy which, like any organization, would prefer to operate under the relatively comforting gaze of only its own members rather than the more revealing ‘sunlight’ of public scrutiny.” Writing for the majority of the D.C. Circuit in *Mead Data Central v. U.S Air Force*, Judge Tamm also concluded that “where there is a balance to be struck, Congress and the courts have stacked the scales in favor of disclosure and against exemption.” Exempt material represents only that small subset of government records for which Congress has determined that an absolute and generalized disclosure rule would do more harm than good and therefore has left the decision to the agencies to be made on a case-by-case basis. “Since the public’s right of access to government information is already well protected by the breadth of the disclosure requirement of the FOIA and since the agency’s discretion is already confined to a narrow class of information, there is less need for exacting court scrutiny of an agency’s decision to disclose exempt material,” he concluded.

The exemptions protect against the disclosure of information that would harm national defense or foreign policy, privacy of individuals, proprietary interests of business, functioning of the government, and other important interests. A document that does not qualify as an “agency record” may be denied on this basis. However, most records in the possession of an agency are “agency records” within the meaning of the FOIA.

Exemption 1/Classified Documents

The first FOIA exemption permits the withholding of properly classified documents. Information may be classified in the interest of national defense or foreign policy.

The rules for classification are established by the President and not the FOIA or other law. The FOIA provides that, if a document has been properly classified under a presidential Executive Order, the document can be withheld from disclosure.

Classified documents may be requested under the FOIA. An agency can review the document to determine if it still requires protection. In addition, the Executive Order on Security Classification establishes a special procedure for requesting the declassification of documents. If a requested document is declassified, it can be released in response to a FOIA request. However, a document that is declassified may still be exempt under other FOIA exemptions.

Exemption 2/Internal Personnel Rules and Practices

The second FOIA exemption covers matters that are related solely to an agency’s internal personnel rules and practices. As interpreted by the courts, there are two separate classes of documents that are generally held to fall within exemption two. They are the “low 2”

affecting “trivial matters” and the “high 2” involving more substantial internal matters, disclosure of which would risk circumvention of a legal requirement.

First, information relating to personnel rules or internal agency practices is exempt if it is a trivial administrative matter of no genuine public interest. A rule governing lunch hours for agency employees is an example.

Second, an internal administrative manual can be exempt if disclosure would risk circumvention of law or agency regulations. In order to fall into this category, the material will normally have to regulate internal agency conduct rather than public behavior.

“Vulnerability Assessments”

Exemption 2’s “circumvention” protection should be readily applicable to vulnerability assessments, which are perhaps the quintessential type of record warranting protection on that basis. Such records assess an agency’s vulnerability (or that of another institution) to some form of outside interference or harm, by identifying those programs or systems deemed the most sensitive and describing specific security measures that can be used to counteract such vulnerabilities.

A prime example of the vulnerability assessments warranting protection under “high 2” are the computer security plans that all federal agencies are now required by law to prepare. In *Shreibman v. Department of Commerce*, Exemption 2 coverage was invoked to prevent unauthorized access to information which could result in “alteration, damage or destruction of data contained in the computer system.” Other categories found likely to result in harmful circumvention include agency audit guidelines and agency testing materials.

Exemption 3/Information Exempt Under Other Laws

The third exemption incorporates into the FOIA other laws that restrict the availability of information. To qualify under this exemption, a statute must require that matters be withheld from the public in such a manner as to leave no discretion to the agency. Alternatively, the statute must establish particular criteria for withholding or refer to particular types of matters to be withheld.

One example of a qualifying statute is the provision of the Tax Code prohibiting the public disclosure of tax returns and tax return information. Another qualifying Exemption 3 statute is the law designating identifiable census data as confidential. Whether a particular statute qualifies under Exemption 3 can be a difficult legal question.

Contractor Proposal Prohibition

In September 1996 Congress passed, and the President signed, the National Defense Authorization Act for FY 1997 including two parallel measures -- one that directly

amends the statute governing armed services acquisitions and another identical provision that amends the statute governing certain civilian agency acquisitions. A study by the General Counsel's Office concludes that it does not appear that BPA can assert Exemption 3 citing the Defense Authorization Act amendments to the Competition in Contracting Act of 1984. That is because BPA has historically claimed and successfully argued that it is not subject to the Competition in Contracting Act of 1984. Therefore, we can selectively rely on only certain provisions of the CICA. Our procurement authority derives from the Bonneville Project Act, the Federal Columbia River Transmission System Act of 1974, and the Pacific Northwest Electric Power Planning and Conservation Act. None of these statutes expressly prohibit the release of this type of information, and therefore they are not exemption 3 statutes under the FOIA.

Exemption 4/Confidential Business Information

The fourth exemption protects from public disclosure two types of information: trade secrets and confidential business information. A trade secret is a commercially valuable plan, formula, process, or device. This is a narrow category of information. An example of a trade secret is the recipe for a commercial food product.

The second type of protected data is commercial or financial information obtained from a person and privileged or confidential. The courts have held that data qualifies for withholding if disclosure by the government would be likely to harm the competitive position of the person who submitted the information. Detailed information on a company's marketing plans, profits, or costs can qualify as confidential business information. Information may also be withheld if disclosure would be likely to impair the government's ability to obtain similar information in the future.

Only information obtained from a person other than a government agency qualifies under the fourth exemption. A person is an individual, a partnership, or a corporation. Information that an agency created on its own cannot normally be withheld under exemption four.

Although there was no formal requirement under the FOIA, prior to passage of the contractor proposal prohibition many agencies notified a submitter of business information that disclosure of the information was being considered. BPA will continue that practice. The submitter then had an opportunity to convince the agency that the information qualifies for withholding. A submitter could also file suit to block disclosure under the FOIA. Such lawsuits were generally referred to as "reverse" FOIA lawsuits because the FOIA is being used in an attempt to prevent rather than to require the disclosure of information.

Three Tests/Four Criteria

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In order to qualify under Exemption 4, a document must meet three tests. It must (1) contain either

trade secrets or “commercial” or “financial” information (2) be “obtained from a person,” and (3) contain either “privileged or confidential” information.

Department of Energy (DOE) regulations set forth four additional criteria to be considered in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4: (1) whether the information has been held in confidence by the person to whom it pertains; (2) whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis for withholding, therefore; (3) whether the information was transmitted to an received by, the Department in confidence; and (4) whether the information is available in public sources.

A series of Circuit and Supreme Court decisions have shaped and reshaped exemption 4 standards. *National Parks v. Morton* in 1974 established the government’s interest in efficient operation and information submitter’s interest in protection from competitive disadvantage.

Two years later in *National Parks v. Kleppe* financial information was exempted from disclosure because operational strengths and weaknesses of concessionaires in the National Parks would be exposed, but their competitors would not. Both were Circuit Court decisions.

By 1984 the Court in *Professional Review Organization v. Health and Human Services* made a determination of whether records were confidential and held that it is not necessary to show actual competitive harm. Actual competition and likelihood of substantial injury is all that is necessary, the Court determined.

A similar case came in 1987 when a District Court held in *Critical Mass v. Nuclear Regulatory Commission* that withholding of reports by a utility consortium as confidential, commercial information because it would impair the governments ability to acquire information required detailed justification.

Another key decision came in 1980 when the U.S. Supreme Court held in *Forsham v. Harris* that raw data were not “agency records” subject to FOIA disclosure and that ordering access would compel the Department of Health, Education, and Welfare to “create” an agency record.

In a case a number of years earlier, *CNA Financial Corporation v. Raymond N. Donovan* (Secretary of Labor), a Circuit Court held that the Trade Secrets Act was a uniform, comprehensive, and reasonable, though perhaps stringent approach to discouraging unauthorized disclosures of private commercial and financial data entrusted to the government and is at least co-extensive with the Freedom of Information Act. The case involved the type of judgments and forecasts courts leave largely to agency expertise, “with judicial review limited by the narrow standard sanctioned.”

The National Park Test

The majority of exemption 4 cases, litigated as a result of requesters' appeals, deal with the issue of whether or not information requested is confidential. Since 1974, the courts have determined confidential information by applying a two-part objective test, as established by precedent in the *National Parks I* case. This test is based on (1) whether the commercial or financial information is likely to impair the Government's ability to obtain necessary information in the future, or (2) whether the disclosure of the requested information will cause substantial harm to the competitive position of the person from whom the information was obtained. The two criteria are known as the "impairment prong" and the "competitive harm" prong."

In footnote 17, the court said it expressed no opinion as to whether other governmental interests are embodied in exemption 4. Specifically, it cites problems of *compliance* and *program effectiveness* as governmental interests possibly secured by the exemption, cited again in the *9 to 5 Organization* decision. Thus in *National Parks I*, the court recognized the possibility that governmental interests other than the duty to obtain necessary information in the future could satisfy non-disclosure under exemption 4.

The court said *National Parks I* did not impose a limit on the number of legitimate interests protected by the exemption. The inquiry in each case should be whether public disclosure of the requested commercial or financial information will harm an identifiable private or governmental interest which Congress sought to protect by enacting exemption 4 of the FOIA.

Critical Mass Standard

However, in 1992 the Supreme Court reviewed a lower court ruling from Critical Mass Energy Project. They let stand a Circuit Court decision that broadened confidentiality for information provided "voluntarily" by business. Consequently, the new Critical Mass Standard requires that in addition to applying the "National Parks Test," determinations must be made as to whether the submitted information was compelled and required to be submitted, or whether the submitted information was provided voluntarily and was not customarily made available to the public.

DOE policy is to apply the new "Critical Mass Standard" agency-wide, provided it does not conflict with another district or circuit court's decision. Within these conditions, DOE and BPA first determine whether the requested information was submitted "voluntarily." If it was, the "Critical Mass Standard" applies. If the information was not supplied voluntarily, the "National Parks Test" is applied by first determining whether disclosure of the information to the public would result in impairment. To establish impairment, two criteria are considered: (a) whether the cessation of such voluntarily supplied information would impair the agency's information-gathering ability or access to information, or (b) whether any alternative means of gathering such information would result in a significant loss of value of the submitted material.

Justifying Competitive Harm

In justifying the competitive harm prong, the agency does not need to demonstrate the actual competitive harm. The agency need only show evidence of actual competition and a likelihood of substantial competitive injury. Examples of competitive injury that may result from disclosure are detailed financial information such as a company's assets, liabilities, and net worth; actual costs, break-even calculations, profits, and profit rates; data describing a company's work force which would reveal labor costs, profit margins, and competitive vulnerability; a company's selling prices, purchase activity, and freight charges; a company's purchase records, including prices paid for advertising; technical and commercial data, names of consultants and subcontractors, performance, costs and equipment information; shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company; currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information; and technical proposals that are submitted, or could be used, in conjunction with offers on government contracts.

Situations and information that are not considered to be protected under the competitive harm prong because of the remoteness of injury to the company as a result of disclosure are, for example, situations in which contracts are not awarded competitively. Information that would cause harm as a result of embarrassing information is also not protected by this prong. The courts have held that commercial entities do not have "corporate privacy" and therefore may not use such reasons to justify nondisclosure based on the competitive harm prong.

Several courts, including the D.C. Circuit, have held that the harm flowing from such "embarrassing" disclosures, or disclosures which could cause "customer or employee disgruntlement," are not cognizable under Exemption 4. Nevertheless, the D.C. Circuit skirted this issue (in *Occidental Petroleum v. SEC*) and expressly did not decide whether an allegation of harm flowing only from the embarrassing publicity associated with disclosure of a submitters illegal payments to government officials would be sufficient to establish competitive harm.

Expanding The Test

Judge Ruth Bader Ginsburg noted in her 1987 *Critical Mass* ruling that the court had not previously decided whether the *National Parks* test constituted the exclusive means by which the government could sustain its exemption 4 burden, i.e., whether information can be justifiably withheld where disclosure would harm the agency in ways unrelated to its ability to gather information in the future. The First Circuit expanded the *National Parks* test in *9 to 5 Organization*, considering "in view of the legitimate governmental interest of efficient operations, it would do violence to the statutory purposes of exemption 4 were the government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities."

Unit Prices/A Contentious Issue

The status of unit prices in awarded government contracts remains a contentious issue. Although there were no new cases on the issue in 1996, the previous year there were four such decisions -- all brought by submitters challenging the agencies' decisions to disclose contract price information -- and in all four cases the submitters were unable to convince the court that disclosure of the prices charged the government would cause them to suffer competitive harm.

Additionally, there are three cases which contain a thorough analysis of the possible effects of disclosure of unit prices -- including two appellate decisions -- and in all three of these cases the courts likewise denied Exemption 4 protection, finding that disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, multiplier, and that the possibility of competitive harm was thus to speculative.

In the most recent case, the Ninth Circuit denied Exemption 4 protection for the unit prices provided by a successful offeror despite the offeror's contention that competitors would be able to determine its profit margin by simply subtracting from the unit price the other component parts which are either set by statute or standardized within the industry. The Ninth Circuit upheld the agency's determination that competitors would not be able to make this type of calculation because the component figures making up the unit price were not in fact, standardized, but instead were subject to fluctuation. Nevertheless, the court found that it is "incumbent upon" a submitter challenging a contract price disclosure decision to "demonstrate that an agency's decision to follow this general proposition" -- namely, the disclosure of contract prices is a cost of doing business with the government -- is somehow arbitrary or capricious. This ruling comports with the court's decision in an earlier unit price case (*AT&T Information Systems v. GSA*) in which it had recognized "the strong public interest in release of component and aggregate prices in Government contract awards."

Justifying Confidentiality

The components of a "detailed justification" of document confidentiality are set out in *Pacific Architects and Engineers, Inc. v. Renegotiation Board and Washington Post Co v. United States Department of health and Human Services*.

A detailed justification should include:

- (a) the extent to which data of the sort in dispute is customarily disclosed to the public, with specific factual or evidentiary material to support the conclusion reached;
- (b) the extent to which disclosure of this information will impair the government's ability to obtain necessary information of this type in

the future, with specific factual or evidentiary material to support the conclusion reached;

(c) the extent to which disclosure of the information will cause substantial harm to the competitive position of the person from whom the information is obtained, with specific factual or evidentiary material to support the conclusion reached; and

(d) the extent to which any harms of the type mention in (b) and (c) could be reduced or eliminated by non-disclosure of the identity of the person submitting the information in dispute.

The second and third prongs of the *Pacific Architects test* are disjunctive. Thus failure to meet one of these prongs is not fatal to an Exemption 4 claim.

Records Outside the Government

If a requested record was obtained by the BPA from a person or entity outside the Government, the Authorizing Official is required by Executive Order to seek the views of that person or entity regarding the release of the record before acting on the request. If the submitter objects to disclosure and the agency then determines that disclosure is appropriate, the Authorizing Official must provide the submitter 7 days notice before disclosure. The criteria listed below determine whether information can be withheld under exemption 4.

it (1) Whether the information has been held in confidence by the person to whom it pertains.

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(3) Whether the information was transmitted to and received by BPA in confidence.

(4) Whether the information is available in public sources.

the (5) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

Authorizing Officials normally consult with the FOIA Officer and Legal Services concerning submitter notification procedures and requirements, documentation of agency records, and possible Trade Secrets Act violations.

In general, business information provided to BPA by a submitter will not be disclosed pursuant to a FOIA request except in accordance with the rules outlined above.

As for those making submissions to the BPA, this Agency will provide a submitter with prompt written notice of a FOIA request or administrative appeal encompassing its business information whenever required under to provide submitters the opportunity to object to disclosure. The written notice will either describe the exact nature of the business information requested, or provide copies of the records containing the information. The BPA will provide notification, either in our acknowledgment letter or in a separate letter, that the Agency is giving the submitter notice and an opportunity to object.

Notice is required when the submitter has, in good faith, designated the information as protected from disclosure under Exemption 4, or (2) when the BPA has reason to believe the information may be protected from disclosure under exemption 4.

Submitters of business information should use good-faith efforts to designate, by appropriate markings, either at the time of submission or shortly thereafter, those portions of their submissions which they think should be protected under exemption 4. Any designation will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a designation period of greater duration.

BPA will carefully consider a submitter's objections and specific grounds for non-disclosure prior to determining whether to disclose business information. Whenever the Agency decides to disclose business information over the objection of a submitter, it will forward to the submitter written notice which shall include a statement of the reasons for which the submitter's disclosure objections were not sustained, a description of the business information to be disclosed, and a specified disclosure date. Such notice to disclose will be forwarded to the submitter a reasonable number of days prior to the disclosure date and the requester notified at the same time.

The regulations call for notice requirements not to apply if the BPA determines the information should not be disclosed, or has already been lawfully published or officially made available to the public, or if disclosure is required by a law other than the FOIA.

Origins of the Trade Secrets Act

The origins of the Trade Secrets Act can be traced to an Act which barred unauthorized disclosure of specified business information by Government revenue officers. There is very little legislative history concerning the original bill, which was passed in 1864. It was reenacted numerous times, with some modification, and remained part of the revenue laws until 1948. Congressional statements made at the time of the re-enactment's indicate that Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents, for in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information.

The Trade Secrets Act came as part of the 1948 revision and codification of the Federal Criminal Code. A committee of legislators, judges, lawyers, and law book publishers

collected provisions and organized, edited, and consolidated them: and the product was enacted into law as Title 18.

The Act was “based upon three pre-existing statutes provisions.” Section 216 of Title 18, “which had made it a misdemeanor for any federal officer or employee to divulge or make known in any manner whatever not provided by law” the operations, style of work, or apparatus of any manufacturer or producer visited by the employee in the course of his or her official duties, or “the amount or source of income, profits, losses, expenditures” disclosed in income tax returns; Section 1335 of Title 19, also a misdemeanor statute, which had prohibited federal officers and employees from disclosing, “in any matter whatever not provided for by law...trade secrets or processes...embraced in any examination or investigation” of the Tariff Commission; and Section 176a of Title 15, which had directed that “any statistical information furnished in confidence” to the Bureau of Foreign and Domestic Commerce was to be held confidential and used “only for the statistical purposes for which it was supplied.”

Despite its apparent sweep, the Trade Secrets Act is no broader than its three predecessor statutes.

“Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof to be seen or examined by any person except as provided by law, shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The remarkably scant legislative history of the 1948 Criminal Code is virtually silent on the Trade Secrets Act. The Reviser’s Note to the Act merely lists the antecedent statutes and declares that “minor changes were made in translations and phraseology.”

In rejecting the *Chrysler* claim the Chief Justice held that Congress was not concerned with public disclosure of trade secrets or confidential business information, and, “unless we were to hold that any federal statute that implies some authority to collect information must grant legislative authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by Chrysler.”

The purpose of the Executive Order was to end discrimination in employment by the Federal Government and those who deal with the Federal Government. “One cannot readily pull from the logic and purposes of the Executive Order any concern with the public’s access to information in Government files or the importance of protecting trade secrets or confidential business statistics,” declared the Chief Justice. The thread between these regulations and any grant of authority by Congress is so strained that it would do violence to established principles of separation of powers to denominate these particular regulations “legislative” and credit them with the ‘binding effect of law’.”

Exemption 5/Internal Government Communications

The FOIA’s fifth exemption applies to internal government documents. An example is a letter from one government department to another about a joint decision that has not yet been made. Another example is a memorandum from an agency employee to his supervisor describing options for conducting the agency’s business.

The purpose of the fifth exemption is to safeguard the deliberative policy making process of the government. The exemption encourages frank discussion of policy matters between agency officials by allowing supporting documents to be withheld from public disclosure. The exemption also protects against premature disclosure of policies before final adoption.

While the policy behind the fifth exemption is well-accepted, the application of the exemption is complicated. The fifth exemption may be the most difficult FOIA exemption to understand and apply. For example, the exemption protects the policy making process, but it does not protect purely factual information related to the policy process. Factual information must be disclosed unless it is inextricably intertwined with protected information about an agency decision.

Protection for the decision making process is appropriate only for the period while decisions are being made. Thus, the fifth exemption has been held to distinguish between documents that are pre-decisional and therefore may be protected, and those which are post-decisional and therefore not subject to protection. Once a policy is adopted, the public has a greater interest in knowing the basis for the decision.

The exemption also incorporates some of the privileges that apply in litigation involving the government. For example, papers prepared by the government’s lawyers can be withheld in the same way that papers prepared by private lawyers for clients are not available through discovery in civil litigation.

Deliberative Process

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency.” As such, it has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.”

The three primary, most frequently invoked privileges incorporated into Exemption 5 are (1) the deliberative process privilege, (2) the attorney work-product privilege, and (3) the attorney-client privilege.

The Functional Test

The threshold issue under Exemption 5 is whether a record is of the sort intended to be covered by the phrase “inter-agency or intra-agency memorandums,” a phrase seeming to contemplate only those documents generated by an agency and not circulated beyond the executive branch. The courts, however, have construed the scope of Exemption 5 far more expansively and have included documents generated outside the agency. This pragmatic approach has been characterized as the “functional test” for assessing the applicability of Exemption 5 protection.

Outside Documents

Regarding documents generated outside an agency but created pursuant to an agency initiative, whether purchased or provided voluntarily without compensation, it has been held that “Congress apparently did not intend inter-agency and intra-agency to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process.” Thus, documents generated by a consultant outside an agency are typically found to qualify for Exemption 5 protection because agencies, in the exercise of their functions, commonly have “a special need for the opinions and recommendations of temporary consultants.” The threshold requirement was served in one case, where no formal relationship existed between the Department of Health and Human Services and a scientific journal reviewing an article submitted for possible publication. The deciding factor, declared the D.C. Circuit, is the “role” the evaluative comments play in deliberations, that is that they are regularly relied upon by agency authors and supervisors in making the agency’s decisions. The Court said agencies “may protect communications outside an agency so long as those communications are part and parcel of the agency’s deliberative process.”

Policy Purposes

The deliberative process privilege is the most commonly invoked. (It is commonly known as Executive privilege). Its general purpose is to “prevent injury to the quality of agency decisions. Specifically, three policy purposes have consistently been held to constitute the basis for this privilege, “to encourage open and frank discussion on matters of policy between subordinates and superiors: (2) to protect against premature disclosure of proposed policies before they are finally adopted, and (3) to protect against private confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action.”

Logically flowing from the foregoing policy considerations is the privileges protection of the “decision-making processes of government agencies.” The privilege protects not

merely documents but the integrity of the deliberative process itself where exposure of the process would do harm.

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. First, the communication must be predecisional, (i.e.), antecedent to the adoption of an agency policy. Second, the communication must be deliberative, (i.e.), “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” The burden is on the agency to show the information in question satisfies both requirements. As long as a document is generated by such a continuing process of agency decision-making, Exemption 5 can be applicable.

Post-decisional documents, however, stand in contrast. They generally embody statements of policy and final opinions that have the force of law that implement an established policy of an agency, or that explain actions that an agency has already taken. Exemption 5 does not apply to post-decisional documents, as “the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.”

Indeed, many courts have questioned whether certain documents at issue were tantamount to agency “secret law,” (i.e.), orders and interpretations which the agency actually applies to the cases before it, and which are routinely used by agency staff as guidance. Such documents should be disclosed because they are not in fact predecisional, but rather “discuss established policies and decisions”. Only those parts of a post-decisional document that discuss predecisional recommendations not expressly adopted can be protected.

The Pre and Post-Decisional Line

Several criterion form the basis of distinction between predecisional and post-decisional documents.

First, an agency should determine whether the document is a “final opinion” within the meaning of one of the automatic disclosure provisions of the FOIA. Congress intended “final opinions” to be only those decisions resulting from proceedings in which a party invoked (and obtained a decision concerning) a specific statutory right of “general and uniform” applicability.

Second, the nature of the decision making authority vested in the office or person issuing the document must be considered. If this author lacks legal decision-making authority, the document is far more likely to be predecisional. Even an assertion by the agency that an official lacks ultimate decision making authority might be “superficial” and unavailing if agency “practices” commonly accord decision making authority to that official.

Third, it is useful to examine the direction in which the document flows along the decision making chain. Naturally, as document “from a subordinate to a superior official

is more likely to be procedural,” than is the contrary case. Final opinions typically flow from a superior with policymaking authority to a subordinate who carries out the policy.” Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decision maker “chooses expressly to adopt or incorporate it by reference.” Although mere “approval” of a predecisional document does not necessarily constitute adoption of it, an inference of incorporation or adoption has twice been found to exist where a decision maker accepted a staff recommendation without giving a statement of reasons. Where it is unclear whether a recommendation provided a basis for final decision, the recommendation should be protectible.

The Factual/Deliberative Distinction

A second primary limitation on the scope of the deliberative process privilege is that it applies only to “deliberative” documents and it ordinarily is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda. Not only would factual material “generally be available for discovery,” but its release usually would not threaten consultative agency functions.

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts generally allow agencies to withhold factual material in an otherwise “deliberative” document under two general types of circumstances. The first circumstance occurs where the author of a document selects specific facts out of a larger group of facts and this very act is deliberative in nature. In *Montrose Chemical v. Train* the summary of a large volume of public testimony compiled to facilitate the EPA Administrator’s decision on a particular matter was held to be part of the agency’s internal deliberative processes. The very act of distilling the testimony, of separating the significant from insignificant facts, constituted an exercise of judgment by agency personnel. Such selective facts are entitled to the same protection as purely deliberative materials, as their release would permit indirect inquiry into the mental processes and so expose predecisional agency deliberations. Thus, to protect the factual materials, an agency must identify a process which could reasonably be construed as predecisional and deliberative.

The second such circumstance is where the information is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency’s deliberations. If revealing the factual information is tantamount to revealing the agency’s deliberations, then the facts may be withheld. Documents that are commonly encompassed by the deliberative process privilege include “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated,” the release of which would likely “stifle honest and frank communication within the agency.” Accordingly, though the case law is not yet entirely settled on the point, “briefing materials” -- such as reports or other documents which summarize issues and advise superiors -- should be protectible under the deliberative process privilege.”

Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny, the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. The privilege is not limited to civil proceedings, but extends to administrative proceedings, and to criminal matters as well.

The privilege sweeps broadly in several respects. First, litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable. The D.C. Circuit has gone so far as to rule that the privilege has also been held to attach to law enforcement investigations. The privilege extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated. The privilege also attaches to law enforcement investigations, where the investigation is based upon specific wrongdoing and represents an attempt to garner evidence and build a case against the suspected wrongdoer.

Second, Rule 26(b)(3) of the Federal Rules of Civil Procedure allows the privilege to be used to protect documents prepared by or for another party or by or for that other party's representative. Courts have looked at the plain meaning of the rule and have extended work-product protection to materials prepared by nonattorneys who are supervised by attorneys.

Third, the work-product privilege has been held to remain applicable where the information has been shared with a party holding a common interest with the agency. In *NLRB v. Sears* the Supreme Court allowed withholding of a final agency decision on the basis that it was shielded by the work-product privilege. But, it also said that Exemption 5 can never apply to final decisions and expressed reluctance to construe the exemption to apply to documents described in the reading room provisions of the FOIA. In *Merrill* the Court said even if a document is a final opinion, and therefore falls within subsection (a)(2)'s mandatory disclosure requirements, it may still be withheld if it falls within the work-product privilege.

Fourth, in *U.S. v. Weber* and *FTC v. Grolier* the Supreme Court afforded sweeping work-product protection to factual materials. Because factual work-product enjoys qualified immunity from civil discovery, such materials are discoverable only upon a showing that the party seeking discovery "has substantial need" of materials which cannot be obtained elsewhere without "undue hardship." In *Grolier* the Supreme Court held that the test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance.

Finally, the Supreme Court has recognized at least a qualified privilege from civil discovery for such documents, i.e., such material was held discoverable only upon a showing of necessity and justification. Applying the routinely and normally discoverable

test of *Grolier* and *Weber Aircraft*, the D.C. Circuit has firmly held that witness statements are protectable under Exemption 5.

Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 concerns “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” Unlike the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. Moreover, although it ordinarily applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon those facts, as well as communications between attorneys which reflect client-supplied information.

The Supreme Court, in the civil discovery context, has emphasized the policy underlying the attorney-client privilege--“that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” The Supreme Court held in *U.S. v. Weber Aircraft* and in *FTC v. Grolier* that the scope of the various privileges is coextensive in the FOIA and civil discovery contexts. Thus, those decisions that expand or contract the privilege’s contours according to whether it is presented in a civil discovery or a FOIA context do not accurately reflect the law.

The parallelism of the civil discovery privilege and Exemption 5 protection is particularly significant with respect to the concept of a “confidential communication” within the attorney-client relationship. Confidentiality may be inferred when the communications suggest that “the government is dealing with its attorneys as would any private party seeking advice to protect personal interests.” In *Upjohn* the Supreme Court held that the privilege covers attorney-client communications where the specifics of the communication are confidential, even though the underlying subject matter is known to third parties. Accordingly, the line of FOIA decisions that squarely conflicts with the *Upjohn* analysis should not be followed.

The Supreme Court concluded that the privilege encompasses confidential communications made to the attorney not only by decision-making control group personnel, but also by lower-echelon employees as well. This broad construction of the attorney-client privilege acknowledges the reality that such lower-echelon personnel often possess information relevant to an attorney’s advice-rendering function.

Other Privileges

The Supreme Court has ruled that Exemption 5 may incorporate virtually all civil discovery privileges. If a document is immune from civil discovery it is similarly protected from mandatory disclosure under the FOIA. Because Rule 501 of the Federal Rules of Evidence provides for courts to create privileges as necessary, there exists the strong potential for “new” privileges to be applied under Exemption 5. However, one

caveat should be noted in the application of discovery privileges under the FOIA. A privilege should not be used against a requester who would routinely receive such information in civil discovery.

Premature Disclosure Exemption

The Supreme Court in *Federal Open Market Committee v. Merrill* found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure. It provides that “for good cause shown...a trade secret or other confidential research, development or commercial information” is protected from discovery. This qualified privilege is available “at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract” and expires upon the awarding of the contract or upon the withdrawal of the offer. The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by endangering consummation of a contract; consequently, “the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should...serve as relevant criteria.”

Based upon this underlying theory, there is nothing to prevent *Open Market v. Merrill* from being read more expansively to protect the government from competitive disadvantage outside of the contract setting, as the issue in *Merrill* was not presented strictly within such a setting. Indeed, one court has recently found that the privilege can extend to certain information generated by government researchers.

While the breadth of this privilege is not yet fully established, a realty appraisal generated by the government in the course of soliciting buyers for its property has been held to fall squarely within it, as have an agency’s background documents which it used to calculate its bid in a “contracting out” procedure, as well as portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors. Quite clearly, however, purely legal memoranda drafted to assist contract award deliberations are not encompassed by this privilege.

More recently, the Supreme Court in *U.S. v. Weber Aircraft*, held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations. This broadens the holding of *Merrill* that a privilege mentioned in the legislative history of Exemption 5 is incorporated by the exemption. The Court ruled in *Weber* that this long recognized civil discovery privilege, even though not specifically mentioned there, nevertheless falls within Exemption 5. The “plain statutory language” and the clear congressional intent to sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations support this result. This privilege has been applied also to protect statements made in Inspector General investigations. (See *Ahearn v. U.S. Army Materials & Mechanics Research Center*, 583 F. Supp. 1123, 1124 (D. Mass. 1984))

Similarly, in *Hoover v. Department of the Interior*, the Court of Appeals for the 5th Circuit recognized an Exemption 5 privilege based on Federal Rules of Civil Procedure 16(b)(4), which limits the discovery of reports prepared by expert witnesses. The document at issue in *Hoover* was an appraiser's report prepared in the course of condemnation proceedings. In support of its conclusions, the Fifth Circuit stressed that such a report would not have been routinely discoverable and that premature release would jeopardize the bargaining position of the government.

Because Exemption 5 incorporates virtually all civil discovery privileges, courts are increasingly recognizing the applicability of other privileges, whether traditional or new, in the FOIA context. Among those other privileges now recognized for purposes of the FOIA are the confidential report privilege (*Washington Post v. HHS*), the presentence report privilege, the critical self-evaluative privilege (*Washington Post v. Justice*), and the settlement negotiation privilege.

Applying the "Foreseeable Harm" Standard

In her FOIA Memorandum of October 4, 1993, Attorney General Janet Reno established new standards of government openness that strongly guide agency decision making under the FOIA, the cornerstone of which is the new "foreseeable harm" standard governing the use of FOIA exemptions. This standard applies together with its corollary emphasis on discretionary FOIA disclosure, based upon the touchstone principle that exempt information "ought not be withheld from a FOIA requester unless it need be." The wide range of agency information that is covered by the three major privileges of Exemption 5 -- the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege--warrants especially close attention in connection with the "foreseeable harm" standard.

Of the three major privileges incorporated into Exemption 5, the traditional privilege protecting the processes of institutional deliberations is the one most commonly applicable to the records maintained at all federal agencies. Over the years, the courts have applied the deliberative process privilege under Exemption 5 to the entire gamut of records that are created during the processes of agency decision-making. Thus, there is much room for agencies to apply the "foreseeable harm" standard within the realm of the deliberative process privilege under Exemption 5 and to disclose information that, in the words of General Reno's FOIA Memorandum, "might technically or arguably fall within" it. In doing so they should be mindful that the "foreseeable harm" standard, by its very nature, requires FOIA officers to consider the applicability of an exemption on a case-by-case basis --through consideration of the reasonably expected consequences of disclosure in each particular case.

In each case, a FOIA officer should try to determine whether disclosure of the information in question would foreseeably harm the basic institutional interests that underlie the deliberative process privilege in the first place. In other words, he or she

must consider whether it “would actually inhibit candor in the decision-making process” to disclose that particular information to the public at that particular time.

In making these harm determinations--which can be difficult ones inasmuch as they must be reached individually and no longer can be made on any categorical basis--agency FOIA officers can be guided by their analyses of a number of primary factors that logically come into play:

(1) The nature of the decision involved. Some agency decisions are highly sensitive and perhaps even controversial; many others are not nearly so dependent.

(2) The nature of the decision making process. Some agency decision-making processes require total candor and confidentiality; many others are not nearly so dependent.

(3) The status of the decision. If the decision is not yet made, then there is a far greater likelihood of harm from disclosure; conversely, with decisions already made there is far less likelihood.

(4) The status of the personnel involved. Are the same agency employees, or other employees who are similarly situated, likely to be affected by the disclosure?

(5) The potential for process impairment. How much room is there for actual diminishment of deliberative quality if the personnel involved do feel inhibited by potential disclosure?

(6) The significance of any process impairment. In some cases, any anticipated “chilling effect” on the agency’s decision-making process might be so minimal as to be practically negligible.

(7) The age of information. While there is no universally applicable age-based litmus test, the sensitivity of all information fades with the passage of time.

(8) The sensitivity of individual record portions. Apart from any other factor or consideration, FOIA officers ultimately must focus on the “individual sensitivity of each item of information.”

Similarly, the application of the “foreseeable harm” standard to records falling within Exemption 5’s attorney work-product privilege holds enormous potential for increased agency disclosure. This is due in large part to the fact that the privilege, as it operates under the FOIA, is extremely broad in multiple respects. Its substantive scope is so broad as to cover literally every bit of information that is prepared in connection with a case.

A proper application of the “foreseeable harm” standard should proceed with full appreciation of the privilege’s exceptional breadth, and of the corresponding FOIA policy obligation to eschew it to the maximum extent possible.

First, when the related litigation has ended, an agency should no longer assert the privilege under the FOIA unless it determines that because of some special continuing sensitivity, disclosure would “cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved.”

Second, the “foreseeable harm” requirement should yield disclosure of the bulk of material found within the broad, fact-laden scope of the privilege. Even if there is such sensitivity to some portion of the litigation file, agencies should take pains to segregate that information from all nonsensitive information in order to achieve a maximum disclosure result.

In sum, the nature of the attorney work-product privilege is such that an agency should always bear in mind the following primary elements when applying the “foreseeable harm” standard to information covered by it:

- Time -- Is the case still pending, or is it sufficiently past that the sensitivity of even the core information covered by the privilege’s first tier has faded?
- Litigation Connection -- If the case itself is at an end, does the information truly remain sensitive due to its connection to similar or recurring litigation?
- Substantive Scope -- distinctions should be drawn between the “attorney thought process” information within the privilege’s inner core, and information that could include even “pure facts” that are covered by its outer scope.
- Inherent Sensitivity -- Regardless of any other consideration, some portions of litigation files simply have no inherent sensitivity in any event.

Even information falling within the traditional attorney-client privilege should be subjected to the foreseeable harm test. This privilege is designed to protect all “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” With the exception of the narrow circumstance in which a government attorney represents an agency employee who is sued individually in a federal case, federal government attorneys represent their own agencies--or sometimes other federal agencies--when acting in a legal capacity. That means that, almost invariably, the privilege that attaches to an attorney’s legal work will be one that his or her agency is free to invoke or not to invoke, as a matter of its administrative discretion. In other words, it is the agency’s own privilege to waive it if it chooses to do so. The Reno Memorandum urged all agencies to consider making liberal waivers of the attorney-client privilege under the FOIA. Often there is a good deal of overlap between this privilege and the work-product privilege already discussed. It will do little good for an agency to pursue discretionary waiver of its attorney work-product privilege, through rigorous application of the “foreseeable harm” elements outlined above, if it does not waive any applicable attorney-client privilege in like fashion.

Similarly, all agency FOIA officers should be mindful that there are strong connections between the attorney-client privilege and the deliberative process privilege as they apply to federal agencies. The same strong policy consideration that can compel discretionary disclosure in relation to the deliberative process privilege, should compel likewise insofar as this privilege overlaps as well.

Exemption 5, more than any other of the Act, is at the very core of federal government operations. No information covered by its broad privileges should be withheld from public scrutiny unless there is an identified need for doing so. It should be “the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.”

Exemption 6 & 7(C)/Personal Privacy

The sixth exemption covers personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This exemption protects the privacy interests of individuals by allowing an agency to withhold intimate personal data kept in government files. Only individuals have privacy interests. Corporations and other legal persons have no privacy rights under the sixth exemption.

The exemption requires agencies to strike a balance between an individual’s privacy interest and the public’s right to know. However, since only a clearly unwarranted invasion of privacy is a basis for withholding, there is a perceptible tilt in favor of disclosure in the exemption. Nevertheless, the sixth exemption makes it harder to obtain information about another individual without the consent of that individual.

The Privacy Act of 1974 also regulates the disclosure of personal information about an individual, using Exemption 7(C). The FOIA and the Privacy Act overlap in part, but there is no inconsistency. An individual seeking records about him or her should cite both laws when making a request. This ensures that the maximum amount of disclosable information will be released. Records that can be denied to an individual under the Privacy Act are not necessarily exempt under the FOIA.

Exemption 7(C) is limited to information compiled for law enforcement purposes.

These exemptions cannot be invoked to withhold from a requester information pertaining only to himself, which means a person may receive his or her personal records by making a request either under the Freedom of Information Act or under the Privacy Act.

The Threshold Requirement

To warrant protection under Exemption 6, information must first meet its threshold requirement. In other words, it must fall within the category of “personnel, medical, and similar files.” Personnel and medical files are easily identified. However, there has not

always been complete agreement about the meaning of the term “similar files.” Prior to 1982, judicial interpretations of that phrase varied considerably and included a troublesome line of cases in the D.C. Court of Appeals, commencing with *Board of Trade v. Commodity Futures Trading Commission*, which narrowly construed the term to encompass only “intimate” personal details.

In 1982, the Supreme Court acted decisively to resolve this controversy. In *U.S. State Department v. Washington Post Co.*, it held, based upon a legislative history review, that Congress intended the term to be interpreted broadly, rather than narrowly. The Court said the protection of an individual’s privacy “surely was not intended to turn upon the label of the file which contains the damaging information. Rather, the Court made clear that all information, which “applies to a particular individual”, meets the threshold requirement for Exemption 6 protection.

The D.C. Circuit, sitting en banc, subsequently reinforced the Supreme Court’s broad interpretation of this term by holding that a tape recording of the last words of the space shuttle Challenger crew, which “revealed the sound and inflection of the crew’s voices during the last seconds of their lives...contains personal information the release of which is subject to the balancing of the public gain against the private harm at which it is purchased.”

It is important to note that, in order to qualify for protection under Exemption 6, information must be identifiable to a specific individual. Information pertaining to a single individual whose identity cannot be determined after deletion of his name from the records does not qualify for Exemption 6 protection.

Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue “would constitute a clearly unwarranted invasion of personal privacy.” This requires a balancing of the public’s right to disclosure against the individuals right to privacy. First, it must be ascertained whether a protectible privacy interest exists which would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary, and the information at issue must be disclosed.

On the other hand, if a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure. If no public interest exists, the information should be protected, as the D.C. Circuit has observed, “something, even a modest privacy interest, outweighs nothing every time.” Similarly, if the privacy interest outweighs the public interest, the information should be withheld. If the opposite is found to be the case the information should be released.

Five Guiding Principles

In 1989, the Supreme Court issued a landmark FOIA decision in *United States Department of Justice v. Reporters Committee*, which greatly affects all privacy-protection decision-making under the Act. The *Reporters Committee* asked for access to

any criminal history records--known as "rap sheets". They are maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealing with a corrupt Congressman. In holding "rap sheets" entitled to protection under Exemption 7(C), the Supreme Court set forth five guiding principles that now govern the process by which determinations are made under both Exemptions 6 and 7(C).

- That substantial privacy interests can exist in personal information even though it has been available to the general public at some place and point in time. If freely available there would be no reason to invoke FOIA.
- The identity of a FOIA requester cannot be taken into consideration in deciding what should be released.
- One should no longer consider the purposes for which the request is made. Such determinations must "turn on the nature of the requested document and its relationship to the public interest."
- The Court limited the public interest "to the kind for which Congress enacted FOIA." The core purpose of FOIA is to "shed light on an agency's performance of its statutory duties."
- Under 7(C) agencies may engage in "categorical balancing" in favor of nondisclosure. As a categorical matter "a certain type of information is always protectible under an exemption without regard to individual circumstances."

Privacy Interest Assessment

The first step in the balancing process requires assessment of the privacy interests, specifically whether public access to the information at issue would violate a viable privacy interest of the subject of such information. In *Reporters Committee* the Supreme Court stressed that "both the common law and literal understandings of privacy encompass the individual's control of information concerning his or her person." Thus, the Court found "a strong privacy interest" must be threatened by the very disclosure of information and not by any possible "secondary effects" of such release. "The material itself had to contain information which would cause an invasion of an individual's privacy."

FOIA requesters, except when they are making first party requests, do not ordinarily expect that their names will be kept private. Therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test. Personal information about FOIA requesters, however, such as home addresses and phone numbers, should not be disclosed. The identities of first party requesters under the Privacy Act of 1974 should be protected because, unlike under the FOIA, an expectation of privacy can fairly be inferred from the personal nature of the records involved in those requests.

The right to privacy of deceased persons is not entirely settled but in most cases death extinguishes their privacy rights. However, particularly sensitive, often graphic, personal details about the circumstances surrounding an individual's death may be withheld where necessary to protect the privacy interest of surviving family members. That is even true of information not particularly sensitive. Individuals who testify at criminal trials do not forfeit their rights to privacy except on those very matters that become part of the public record. Similarly, individuals who provide law enforcement agencies with reports of illegal conduct have well-recognized privacy interests, particularly when such persons reasonably fear reprisals for their assistance. Additionally, witnesses who provide information to investigative bodies--administrative and civil, as well as criminal--are generally accorded privacy protection.

Public Interest Assessment

Once it has been decided that a personal privacy interest is threatened by a requested disclosure, the second step in the balancing process comes into play. This stage requires an assessment of the public interest in disclosure. The burden of establishing that disclosure would serve the public interest is on the requester. In *Reporters Committee*, the Supreme Court limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: "To shed light on an agency's performance of its statutory duties." Information that does not directly reveal the operations or activities of the federal government, the Supreme Court has stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve." If an asserted public interest is found to qualify under this narrowed standard, "it then must be accorded some measure of value so that it can be weighed against the threat to privacy."

Even before that landmark case the law was clear that disclosure must benefit the public overall and not just the requester himself. A request made for purely commercial purposes, or a request made to supplement discovery in a private lawsuit does not further a public interest. In fact, one court has observed that if the requester truly had a great need for the records for purposes of litigation, he or she should seek them in that forum, where it would be possible to provide them under an appropriate protective order.

In *Reporters Committee*, the Supreme Court approved the majority view that the requester's personal interest is irrelevant. First, as the Court emphasized, the requester's identity can have "no bearing on the merits of his or her FOIA request." In so declaring, the Court ruled unequivocally that agencies should treat all requesters alike in making FOIA disclosure decisions. The only exception to this, the Court specifically noted, is that an agency should not withhold from a requester any information that implicates the requester's own interest. Furthermore, the "public interest" balancing required under the privacy exemptions should not include consideration of the requester's "particular purpose" in making the request. Instead, the Court has instructed, the proper approach to the balancing process is to focus on "the nature of the requested document" and to consider "its relationship to" the public interest generally. It necessarily involves a more general "public interest" assessment based upon the contents and context of the records sought and their connection to any "public interest" that would be served by disclosure.

One purpose that the FOIA was designed for is to “check against corruption and to hold the governors accountable to the governed.” Indeed, information which would inform the public of violations of the public trust has a strong public interest and is accorded great weight in the balancing process. As a general rule, proven wrongdoing of a serious and intentional nature by a high ranking government official is of sufficient public interest to outweigh the privacy interest of the official. By contrast, less serious misconduct by low-level agency employees generally is not considered of sufficient public interest to outweigh the privacy interest of the employee. Nor is there likely to be strong public interest in the names of censured employees when the case has not “occurred against the backdrop of a well-publicized scandal” which has resulted in “widespread knowledge” that certain employees were disciplined. Any general public interest in mere allegations of wrongdoing does not outweigh an individual’s privacy interest in unwarranted association with such allegations.

Weighing Competing Interests

Once both the privacy interest at stake and the public interest in disclosure have been ascertained, the two competing interests must be weighed against one another. In other words, it must be determined which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. In balancing these interests, “the clearly unwarranted” language of Exemption 6 weights the scales in favor of disclosure. If the public benefit is weaker than the threat to privacy, the latter will prevail and the information should be withheld. The threat to privacy need not be obvious. It need only outweigh the public interest.

Although “the presumption in favor of disclosure is as strong under Exemption 6 as can be found anywhere in the Act,” the courts have vigorously protected the personal, intimate details of an individual’s life--consistently protecting personal information which, if disclosed, is likely to cause the individual involved personal distress or embarrassment. Courts regularly uphold the nondisclosure of information concerning marital status, legitimacy of children, welfare payments, family fights and reputation, medical details and conditions, date of birth, religious affiliation, citizenship data, social security account numbers, criminal history records, incarceration of U.S. citizens in foreign prisons, sexual inclinations or associations, and financial status. Even “favorable information,” such as details of an employee’s outstanding performance evaluation, can be protected on the basis that it “may well embarrass an individual or incite jealousy” among co-workers. Moreover, release of such information “reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy.”

Prior to the *Reporters Committee* decision, the courts analysis in “mailing list” cases turned on the requester’s purpose, or the “use” to which the requested information was intended to be put. As noted before, many courts have held that requests made for the sole purpose of obtaining mailings lists for solicitation are purely commercial and consequently involve no public interest. In those cases where “mailing list” requests

were made for noncommercial purposes, however, the courts prior to *Reporters Committee* recognized a variety of public interest factors entitled to heavy and often dispositive weight.

The Supreme Court in *Reporters Committee*, however, firmly repudiated any analysis based on either the identity, circumstances, or intended purpose of the particular FOIA requester at hand. Rather, it said, the analysis must turn on the nature of the document and its relationship to the basic purpose of the FOIA. The D.C. Court of Appeals followed *Reporters Committee* by finding that cases relying on beneficial purposes of the requester were grounded in a disapproved proposition. That was that Exemption 6 carried with it an implied limitation that the information once disclosed, may be used only by the requesting party and for the public interest purpose upon which the balancing was based.

Thus, it was irrelevant that the requester's purpose was to use the list of federal retirees to aid in its lobbying efforts on behalf of those retirees. Although stopping short of creating a nondisclosure category encompassing all mailing lists, the D.C. Circuit in *National Association of Retired Federal Employees (NARFE)* did hold that mailing lists consisting of names and home addresses of federal annuitants are categorically withholdable under Exemption 6.

Exemption 6 requests for civilian employees' names, present and past position titles, grades, salaries and duty stations were generally releasable as no viable privacy interest exists in such data. The Justice Department recommends the release of additional items, particularly those relating to professional qualifications for federal employment. Courts have found that because of the threat of terrorism, servicemen stationed outside the United States have a greater expectation of privacy. Courts have, however, ordered the release of names of military personnel stationed in the United States. In addition, certain other federal employees, such as law enforcement personnel, possess by virtue of the nature of their work, protectible privacy interests in their identities and work addresses. Purely personal details pertaining to government employees are protectible under Exemption 6. Indeed, courts generally have recognized the sensitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service. In addition, the identities of persons who apply for but are not selected for federal government employment may be protected.

Similarly, the courts customarily have extended protection to the identities of mid- and low-level federal employees accused of misconduct, as well as to the details and results of any internal investigation into such allegations of impropriety. The D.C. Circuit has reaffirmed this position in *Dunkelberger v. Department of Justice*. It made very clear in *Dunkelberger* that even post-*Reporters Committee*, the D.C. Circuit's decision in *Stern V. FBI* remains solid guidance for the balancing of the privacy interests of federal employees accused of wrongdoing against the public interest in shedding light on agency activities.

(*Dunkelberger* upheld the FBI's refusal to confirm or deny the existence of letters of reprimand or suspension for alleged misconduct by an undercover agent and *Beck* upheld

the agency's refusal to either confirm or deny existence of records concerning alleged wrongdoing of named DEA agents).

In the early 1980's a peculiar line of cases began in the D.C. Circuit concerning professional or business conduct of an individual. Specifically, the courts began to require the disclosure of information concerning an individual's business dealing with the federal government. Indeed, even embarrassing information, if related to an individual's professional life, was subject to disclosure. (names and addresses of unsuccessful grant applicants).

The D.C. Circuit has since clarified that any such lack of privacy an individual has in his business dealings applies only to purely "business judgments and relationships." An individual, however, has a very strong interest in allegations of wrongdoing or in the fact that he or she was a target of a law enforcement investigation, even when the alleged wrongdoing occurred in the course of the individual's professional activities. Moreover, under *Reporters Committee*, an individual doing business with the federal government certainly may have some protectible privacy interest, and such dealings with the government do not alone necessarily implicate a public interest that furthers the purpose of the FOIA. (Information about a defense contractor would reveal nothing directly about the behavior of the Congressman with whom he allegedly dealt or about the conduct of the Department of Defense in awarding contracts to his company).

In applying Exemption 6, it must be remembered that all reasonably segregable, nonexempt portions of requested records must be released. For example, in *Air Force v. Rose*, the Supreme Court ordered the release of case summaries of disciplinary proceedings provided that personal identifying information was deleted. Likewise, Circuit Courts have upheld the nondisclosure of the names and identifying information of employee-witnesses where disclosure would link each witness to a particular previously disclosed statement. They have also ordered the disclosure of computerized lists of numbers and types of drugs routinely ordered by the congressional pharmacy after deletion of personal identifiers and ordered disclosure of documents concerning disciplined IRS employees, provided all names and other identifying information were deleted.

Nevertheless, in some situations the deletion of personal identifying information may not be adequate to provide necessary privacy protection. It is significant that in *Air Force v. Rose*, the Supreme Court specifically admonished that if it were determined on remand that the deletions of personal references were not sufficient to safeguard privacy, the summaries of disciplinary hearings should not be released.

Despite the Supreme Court admonition in *Rose*, two courts recently permitted redaction only of information that directly identifies the individuals to whom it pertains. In ordering the disclosure of information pertaining to air traffic controllers reinstated shortly after the strike, the Sixth Circuit held that only items that "by themselves" would identify the individual -- names, present and pre-removal locations, and social security numbers-- could be withheld. They added that there might be additional withholdings in

particularized cases. Similarly, the District Court in Northern California ordered disclosure of application packages for candidates for an Air Force graduate degree program with the redaction of only the applicants names, addresses and social security numbers. While the package described education, careers, projects and achievement, the court concluded it could not “discern how there is anything more than a ‘mere possibility’ that plaintiff or others will be able to discern to which applicant each redacted application corresponds.” The key consideration should be whether the information in question can be disclosed without foreseeably harming the privacy interests of the individual involved. When the information in question concerns a small group of individuals who are known to each other and easily identifiable from the details contained in the information, redaction might not adequately protect privacy interests. A determination of what constitutes identifying information requires both an objective analysis and an analysis “from the vantage point of those familiar with the mentioned individuals.”

Glomarization/Refusal to Confirm or Deny

It may be necessary to go a step further than withholding in full without segregation. It may be necessary to follow special “Glomarization” procedures to protect the “targeted” individual’s privacy. If a request is formulated in such a way that even acknowledgment of the existence of responsive records would cause harm, then the subject’s privacy can be protected only by refusing to confirm or deny that responsive records exist. This special procedure is a widely accepted method of protecting even the mere mention of a person in law enforcement records.

Similarly, “Glomarization” would be appropriate in responding to a request targeting such matters as a particular citizen’s welfare records or the disciplinary records of an employee accused of relatively minor misconduct. Generally, this approach is proper whenever mere acknowledgment of the existence of records would be tantamount to disclosing an actual record the disclosure of which “would constitute a clearly unwarranted invasion of personal privacy.”

Exemption 7/Law Enforcement

The seventh exemption allows agencies to withhold law enforcement records in order to protect the law enforcement process from interference. The exemption was amended slightly in 1986, but it still retains six specific sub exemptions.

- Exemption (7)(A) allows the withholding of a law enforcement record that could reasonably be expected to interfere with enforcement proceedings. This exemption protects an active law enforcement investigation from interference through premature disclosure.
- Exemption (7)(B) allows the withholding of information that would deprive a person of a right to a fair trial or an impartial adjudication. This exemption is rarely used.

- Exemption (7)(C) recognizes that individuals have a privacy interest in information maintained in law enforcement files. If the disclosure of information could reasonably be expected to constitute an unwarranted invasion of personal privacy, the information is exempt from disclosure. The standards for privacy protection in Exemption 6 and Exemption (7)(C) differ slightly. Exemption (7)(C) protects against an unwarranted invasion of personal privacy while Exemption 6 protects against a clearly unwarranted invasion. Also, Exemption (7)(C) allows the withholding of information that “could reasonably be expected to” invade someone’s privacy. Under Exemption 6, information can be withheld only if disclosure “would invade” someone’s privacy.
- Exemption (7)(D) protects the identity of confidential sources. Information that could reasonably be expected to reveal the identity of a confidential source is exempt. A confidential source can include a state, local, or foreign agency or authority, or a private institution that furnished information on a confidential basis. In addition, the exemption protects information furnished by a confidential source if the data was compiled by a criminal law enforcement authority during a criminal investigation or by an agency conducting a lawful national security intelligence investigation.
- Exemption (7)(E) protects from disclosure information that would reveal techniques and procedures for law enforcement investigations. It also protects prosecutions that would disclose guidelines for law enforcement investigations or prosecutions if disclosure of the information could reasonably be expected to risk circumvention of the law.
- Exemption (7)(F) protects law enforcement information that could reasonably be expected to endanger the life or physical safety of any individual.

Exemption 8/Financial Institutions

The eighth exemption protects information that is contained in or related to examination, operating, or condition reports prepared by or for a bank supervisory agency such as the Federal Deposit Insurance Corporation, the Federal Reserve, or similar agencies.

Exemption 9/Geological Information

The ninth FOIA exemption covers geological and geophysical information, data, and maps about wells. This exemption is rarely used.

FOIA Exclusions

The 1986 amendments to the FOIA gave limited authority to agencies to respond to a request without confirming the existence of the requested records. Ordinarily, any proper request must receive an answer stating whether there is any responsive information, even if the requested information is exempt from disclosure.

In some narrow circumstances, acknowledgment of the existence of a record can produce consequences similar to those resulting from disclosure of the record itself. In order to avoid this type of problem the 1986 amendments established three “record exclusions.”

The exclusions allow an agency to treat certain exempt records as if the records were not subject to the FOIA. An agency is not required to confirm the existence of three specific categories of records. If these records are requested, the agency may respond that there are no disclosable records responsive to the request. However, these exclusions do not broaden the authority of any agency to withhold documents from the public. The exclusions are only applicable to information that is otherwise exempt from disclosure.

The first exclusion may be used when a request seeks information that is exempt because disclosure could reasonably be expected to interfere with a current law enforcement investigation (exemption (7)(A)). There are three specific prerequisites for the application of this exclusion. First, the investigation in question must involve a possible violation of criminal law. Second, there must be reason to believe that the subject of the investigation is not already aware that the investigation is underway. Third, disclosure of the existence of the records--as distinguished from the contents of the records--could reasonably be expected to interfere with enforcement proceedings.

When all of these conditions exist, an agency may respond to a FOIA request for investigatory records as if the records are not subject to the requirements of the FOIA. In other words, the agency’s response does not have to reveal that it is conducting an investigation.

The second exclusion applies to informant records maintained by a criminal law enforcement agency under the informant’s name or personal identifier. The agency is not required to confirm the existence of these records unless the informant’s status has been officially confirmed. This exclusion helps agencies to protect the identity of confidential informants. Information that might identify informants has always been exempt under the FOIA.

The third exclusion does not apply to all classified records on the specific subjects. It only applies when the records are classified and when the existence of the records is also classified. Since the underlying records must be classified before the exclusion is relevant, agencies have no new substantive withholding authority.

In enacting these exclusions, congressional sponsors stated that it was their intent that agencies must inform FOIA requesters that these exclusions are available for agency use. Requesters who believe that records were improperly withheld because of the exclusions can seek judicial review.

Administrative Appeal Procedures

Whenever a FOIA request is denied, the agency must inform the requester of the reasons for the denial and the requester's right to appeal to the head of the agency or the Freedom of Information Act Officer. A requester may appeal the denial of a request for a document or for a fee waiver. A requester may contest the type or amount of fees that were charged. A requester may appeal any other type of adverse determination including a rejection of a request for failure to describe adequately the document being requested. A requester can also appeal because the agency failed to conduct an adequate search for the documents that were requested. The appeal is a simple administrative appeal. No one needs a lawyer and there is no charge for making such a filing.

An appeal is filed by sending a letter to the Freedom of Information Act Officer, Bonneville Power Administration, P.O. Box 3621, Portland, OR., 97208. The envelope containing the letter of appeal should be marked in the lower left hand corner with the words "Freedom of Information Act Appeal."

BPA assigns a number to all FOIA requests that are received. The number should be included in the appeal letter, along with the name and address of the requester. It is a common practice to include a copy of the agency's initial decision letter as part of the appeal, but this is not required. A telephone number is also helpful.

Although an appeal does not have to contain any arguments, it normally is helpful to include any facts supporting the case for reversing the initial decision. Although there is no deadline for filing an appeal it is a good idea to file promptly to avoid any documents being destroyed.

An agency is required to make a decision on an appeal within twenty days (excluding Saturdays, Sundays, and federal holidays). It is possible for an agency to extend the time limits by an additional ten days. Once the time period has elapsed, a requester may consider that the appeal has been denied and may proceed with a judicial appeal.